

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ALVIN BALDUS, CARLENE BECHEN,
ELVIRA BUMPUS, RONALD BIENDSEIL,
LESLIE W DAVIS III, BRETT ECKSTEIN,
GLORIA ROGERS, RICHARD KRESBACH,
ROCHELLE MOORE, AMY RISSEEUW,
JUDY ROBSON, JEANNE SANCHEZ-BELL,
CECILIA SCHLIEPP, TRAVIS THYSSEN,
CINDY BARBERA, RON BOONE, VERA
BOONE, EVANJELINA CLEERMAN,
SHEILA COCHRAN, MAXINE HOUGH,
CLARENCE JOHNSON, RICHARD LANGE,
and GLADYS MANZANET,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE
MOORE and RONALD KIND,

Intervenor Plaintiffs,

vs.

Members Of The Wisconsin Government
Accountability Board, Each Only In His Official
Capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, and TIMOTHY
VOCKE, and KEVIN KENNEDY, Director
And General Counsel For The Wisconsin
Government Accountability Board,,

Defendants.

F. JAMES SENSENBRENNER, JR., THOMAS
E. PETRI, PAUL D. RYAN, JR., REID J.
RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action No. 11-CV-562
JPS-DPW-RMD

VOCES DE LA FRONTERA, INC., RAMIRO
VARA, OLGA VARA, JOSE PEREZ and
ERICA RAMIREZ,

Plaintiffs,

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, and TIMOTHY
VOCKE, and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin Government
Accountability Board,

Defendants.

Case No. 11-CV-1011
JPS-DPW-RMD

**MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION OF SCOPE OF
ORDER OF FEBRUARY 16 RELATED TO TRIAL SUBPOENA OF JAMES R.
TROUPIS, ESQ., AND FOR ORDER RELATED TO WISCONSIN CODE OF
PROFESSIONAL CONDUCT RULE 20:1.6 (5)**

INTRODUCTION

As described in greater detail in the motion filed by third-party witness James R. Troupis on February 20, 2012, Attorney Troupis was not, as a practical matter, involved in this case until last Friday, February 17, when he was subpoenaed for trial. He is not a party, is not the attorney for any of the parties, never received a subpoena for documents, has not been deposed and, before last Friday night, he had never reviewed any order in this case.

Citing this Court's earlier decisions, the Consolidated Plaintiffs have indicated that they wish to question Attorney Troupis "concerning 'advice on political, strategic or policy issues . . . [which] would not be shielded from disclosure by the attorney-client privilege,'" *see Evans v. City of Chicago*, 231 F.R.D. 302, 312 (N.D. Ill. 2005) (citations omitted), as they relate to approximately 150 documents produced by defendants and/or the Legislature late last week in compliance with this Court's February 16 Order. (84 documents were addressed by the Court's

Order, and on Friday, February 17, Michael Best & Friedrich produced an additional group of documents) Mindful of this Court's admonishment in an earlier Order directing counsel for the parties and the Legislature to "*cooperate immediately*," as well as his own ethical requirement that he protect client confidences under SCR 20:1.6(a)¹, Attorney Troupis and his counsel promptly sought to reach a stipulation and order with Attorney Peter Earle, counsel for the Consolidated Plaintiffs. Unfortunately, notwithstanding the good faith efforts of all counsel involved, a stipulation could not be reached.

I. Troupis' Mandatory Ethical Obligations Require Him Not to Reveal Information Relating to the Representation of a Client.

Mr. Troupis is a lawyer licenced to practice in Wisconsin. As such, he is duty-bound to uphold the ethical rules imposed upon him by the Wisconsin Supreme Court. Those ethical obligations are broader than the attorney client privilege: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." *First Wisconsin Mortgage Trust v. First Wisconsin Corporation*, 584 F. 2d 201, 212 (7th Cir. 1978) (J. Castle concurring in part and dissenting in part).

The relevant ABA Comment to SCR 20:1.6 recognizes that a lawyer may be ordered to reveal confidential information by a court but should nonetheless assert the attorney-client privilege unless the client consents to the disclosure:

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all

¹ Wisconsin Supreme Court Rule ("SCR") 20:1.6(a) states "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c)."

nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

Even where disclosure is ordered by a court, in the context of a judicial proceeding, the disclosure should be made in a restrictive manner and only to those “having a need to know”:

[14] ... In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Mr. Troupis, therefore, cannot testify about any “information relating to the representation of his clients” without his clients’ consent, and absent this court ordering him to do so. Assuming the court issues such an order, and that the order is not a blanket command to testify about any and all issues, topics, conversations, mental impressions, and legal advice he gave to clients, unlimited as to time, scope, or circumstance, Troupis must be careful to keep his testimony within the limiting scope of the order. Courts recognize that blanket commands concerning attorney testimony are unwise. See *In re Grand Jury Proceedings*, 402 F. Supp. 2d 1066, 1067-68 (D. Minn. 2005)(ordering attorney-witness to answer questions pertaining to client communications, but “[a]t the same time, the Court recognizes its inability to foresee every question which may be put to the attorney-witness. Accordingly, the Court declines to direct him to answer every question which may be put to him.”).

In *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002), the court held that when a public lawyer is subpoenaed to testify before a grand jury as part of a criminal proceeding, the attorney-client privilege will not extend to protect communications between government lawyers and the public officials they serve. *Id.* at 293. However, the court acknowledged that “at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client” citing *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff’d*, 734 F.2d 18 (7th Cir. 1984) which held that the attorney-client privilege “unquestionably” extends to conversations between government lawyers and administrative personnel.

This court found that “the documents produced by the Legislature are not protected by the attorney-client privilege. Privilege does not apply to documents that concern ‘advice on political, strategic, or policy issues.’” (February 16, 2012 Order.) However, the Order does not (and could not) address Mr. Troupis’ testimony, subpoenaed on February 17, 2012 after the Order was entered.

Mr. Troupis is duty bound not to answer any questions about the content of the documents. If ordered to do so, he may reveal information related to his representation, but the court should carefully subscribe the scope of the order to include only those topics that clearly fall within “political, strategic, or policy” issues.

II. After Being Ordered to Testify per SCR 20:1.6(c)(5), Troupis Will Testify About Information Involving "Advice on Political, Strategic, or Policy Issues" Identified in the Documents

Mr. Troupis will satisfy his obligations as a witness. Applying the “political, strategic and policy” standard, attached hereto as Exhibit A is a list of items by category to address.

Exhibit A lists the documents that Attorney Troupis understands were produced in response to the February 16 Order (and which are Bates-numbered JRT 0001-0127). In the list,

Attorney Troupis identifies for the Court (and Consolidated Plaintiffs) first those documents that he believes he can testify to pursuant to a court order under SCR 20:1.6(c)(5)²—documents that he believes his testimony could fall within the explicit category described by the Court as political, strategic and policy. This category includes those documents related to third party conversations by Mr. Troupis with potential witnesses at hearing on Act 43, including MALDEF, Rick Esenberg and Eileen Bruszewitz.

In a second category Exhibit A lists those documents for which he believes that any testimony he is asked to give beyond simply authenticating the documents will require that he disclose attorney-client privileged information that would not fall within the Court’s “political, strategic and policy” categorization as any testimony would go to Attorney Troupis advice on specific issues of litigation, litigation strategy and compliance with the law. For example, one document is specific summary of the factual issues required to defend, on legal grounds, the proposed statute, *see* JRT021-022, and another document concerns specific legal advice on disenfranchisement and how it is viewed by the Courts and is likely to be viewed by future courts, *see* JRT052. Attorney Troupis believes it is not appropriate for him to testify about those documents in any respect, and he has no authority to disclose and cannot discuss those matters in any respect absent a court order under SCR 20:1.6(c). Attorney Troupis respectfully requests that he not be ordered to address those documents.

In a third category in Exhibit A are those documents about which he has little or no knowledge or recollection. Many are simply notes about meetings and such, and Ordering testimony pursuant to a court order under SCR 20:1.6(c) will not advance this matter.³

² SCR 20:1.6(c) provides that “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: ... (5) to comply with other law or a court order.”

³ Because this Court has wisely ordered that Attorney Troupis should be subject to a discovery deposition before giving any testimony at trial, to the extent the parties want him to testify about this category of documents, it presumably can be done without having the Court spend time on the issues.

CONCLUSION

Because the issue of Attorney Troupis' testimony regarding the documents produced did not arise until he was served with the trial subpoena the evening of February 17, the February 16 Order compelling production obviously could not address it. Thus, Mr. Troupis seeks guidance to allow him to navigate through the difficult position he finds himself in as a witness compelled to testify about information relating to the representation of a client, yet duty bound not to violate his ethical obligations. As identified in the motion, Mr. Troupis is willing to testify, and in fact appeared today in Court ready to testify, but he respectfully requests clarification about the scope of his testimony he will be required to give and requests an Order to protect him from ethical concerns.

DATED: February 20, 2012.

/s John B. Tuffnell

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